LIBRARY
SUPREME COURT, U. S

FILED
JAN 30 1974
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, et al.,
PETITIONERS,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY IN SUPPORT OF THE RESPONDENTS

J. HAROLD FLANNERY
ROGER L. RICE
CENTER FOR LAW AND EDUCATION
HARVARD UNIVERSITY
14 Appian Way
Cambridge, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Introduction	1
Interest of Amicus Curiae	2
Argument	3
I. Should The Court Decide To Reach This Case On The Merits It Should Affirm The Judgment of The Supreme Court of Washington	3
A. The Equal Protection Clause of The Fourteenth Amendment Does Not Condemn As "Suspect" Classifications Aimed At Bringing Racial Minorities Into The Mainstream of American Life	3
B. The State's Interest In Training Minority Members of The Legal Profession Is The Kind of Interest Which American Education Has Always Sought To Advance	5
II. This Court Ought Not Decide Important Constitutional Issues In A Case Which Lacks An Adequate Record And Is Very Likely Moot	6
A. The Record Is Inadequate In At Least Two Crucial Respects	7
B. This Case Is Moot. A Decision By This Court Will Have No Practical Effect on DeFunis' Law School Career	11
Conclusion	13

Table of Citations

Cases

Arnett v. *Seattle General Hospital*, 65 Wash. 2d 22, 395 P. 2d 503 (1964)	9
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936)	7

Page

Browning v. *Slenderella Systems*, 54 Wash. 2d 440, 341 P. 2d 859 (1959) 9

Citizens Against Mandatory Bussing v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972) 9

Citizens Against Mandatory Bussing v. *Palmason*, 80 Wash. 2d 445, 495 P. 2d 657 (1972) 9

Commonwealth of Massachusetts v. *Painten*, 389 U.S. 560 (1968) 10

Ex parte Virginia, 100 U.S. 339 (1879) 3

Ferrell v. *Dallas Independent School District*, 261 F. Supp. 545 (N.D. Tex. 1966), *cert. denied* 393 U.S. 856 (1968) 6

Gaston County, North Carolina v. *United States*, 395 U.S. 285 (1969) 7, 8

In re Johnson, 71 Wash. 2d 245, 427 P. 2d 968 (1967) 9

Johnson v. *New York State Education Department*, 93 S. Ct. 259 (1972) 2

Lau v. *Nichols*, #72-6520, October Term 1973 2

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964) 11

Needleman v. *United States*, 362 U.S. 600 (1960) 11

O'Meara v. *Washington State Board Against Discrimination*, 58 Wn. 2d 793, 365 P. 2d 1 (1961) 9

Oregon v. *Mitchell*, 400 U.S. 112 (1970) 8

Price v. *Evergreen Cemetery Company of Seattle*, 57 Wash. 2d 352, 357 P. 2d 702 (1960) 9

Rescue Army v. *Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947) 6

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 11

Roe v. *Wade*, 410 U.S. 113 (1973) 12

San Antonio Independent School District v. *Rodriguez*, 93 S. Ct. 1278 (1973) 4

Slaughterhouse Cases, 83 U.S. 36 (1872) 3

Smith v. *State of Mississippi*, 373 U.S. 238 (1963) 10

Page

Socialist Labor Party v. *Gilligan*, 406 U.S. 583 (1972) . 6
Strauder v. *West Virginia*, 100 U.S. 303 (1879) 3
United States v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), *cert. denied* 404 U.S. 984 (1971) .. 9
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 12

Miscellaneous

Hansen, *Liberalism and American Education* (New York, 1926) 5
H. Hearings on Extension of the Voting Rights Act Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., ser. 3 (1969) .. 8
New York Times, January 23, 1971 10
Schmid and Miller, *Populations Trends and Educational Change in the State of Washington*, Washington State Census Board (1960) 8
U. S. Bureau of the Census, *State of Birth Subject Reports*, PC(2)-2A (March, 1973) 8
U. S. Commission on Civil Rights, 2 *Racial Isolation in the Public Schools* (1967) 9
U. S. Department of Commerce, *1970 Census of Population*, Vol. 1, Pt. 49 (1973) 9, 10

Index

Page

Address Labor Party v. Gilligan, 406 U.S. 583 (1972) 6

Arnett v. West Virginia, 190 U.S. 305 (1870) 9

United States v. Freeworkers Local 86, 413 F. 2d 943 (9th Cir. 1971), cert. denied 401 U.S. 954 (1971) 9

United States v. Montgomery, Inc., 340 U.S. 38 (1950) 10

Bibliography

Bureau, Education and American Education (New York, 1950) 9

II. Hearings on Extension of the Voting Rights Act Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., pt. 3 (1969) 10

New York Times, January 29, 1971 10

Schmid and Miller, Constitutional Freedom and Equal Health Care in the State of Washington, Washington State Census Board (1960) 9

U.S. Bureau of the Census, State of Illinois Supplementary Reports, PC(2)-1A (March, 1970) 9

U.S. Commission on Civil Rights, Voting in the Mississippi Delta, Vol. I, Pt. 1 (1968) 9

U.S. Department of Commerce, 1970 Census of Population, Vol. I, Pt. 1 (1970) 9

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, et al.,
PETITIONERS,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY IN SUPPORT OF THE RESPONDENTS

Introduction

We present this brief in support of the respondents with the consent of all parties pursuant to Supreme Court

Rule 42(1). Copies of the letters of consent are attached to our covering letter to the Clerk of this Court. We rely on respondents' treatment of the questions presented for review, constitutional and statutory provisions involved and statement of the case. The findings of fact and conclusions of law, oral decision and judgment of the Washington Superior Court for King County are found in Petitioners' Appendix pp. 55-60. The opinion of the Supreme Court of Washington reversing the Superior Court decision is reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

Interest of Amicus Curiae

The Center for Law and Education, Harvard University, was created jointly by the Harvard Law School and the Harvard Graduate School of Education in 1969. The Center is funded by the United States Office of Economic Opportunity to work in conjunction with local legal service offices and other attorneys to promote reform in American education by working in the area of social policy and the law, especially on behalf of the poor. The Center's attorneys have concentrated on problems in the following areas: racial discrimination; federal programs, resource allocation, within and between school districts; bilingual education; "ability grouping"; and excluded children. Center personnel have participated in litigation, including the preparation of several *amicus* briefs; done research and writing; drafted legislation; and negotiated with public officials. The Center publishes a bulletin entitled *Inequality in Education*. Recent *amicus* briefs filed by the Center in this Court include those in *Johnson* v. *New York State Education Department*, 93 S.Ct. 259 (1972) and *Lau* v. *Nichols*, No. 72-6520, October Term 1973. The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which

is material under governing legal principles. The filing of this brief permits the Center to present an argument on a matter substantially affecting the range and quality of educational opportunities afforded minority group students in this country.

Argument

I. Should the Court Decide To Reach This Case on the Merits It Should Affirm the Judgment of the Supreme Court of Washington.

The thrust of this brief is that this Court ought not resolve in this case the delicate and important issues which are posed by the parties and *amici*. Our reasons for urging this course are spelled out in Part II, *infra*. However, should the Court feel that the posture of the case is one calling for a decision on the merits, we believe that the judgment of the court below should be affirmed.

A. *The Equal Protection Clause of the Fourteenth Amendment Does Not Condemn as "Suspect" Classifications Aimed at Bringing Racial Minorities into the Mainstream of American Life.*

The Thirteenth, Fourteenth and Fifteenth Amendments ratified as a national purpose the elimination of disabilities borne by black people at the hands of the white majority.[1] Emanating from and consistent with this purpose the University of Washington Law School has adopted an admissions procedure the goal of which is to increase the number of qualified black and minority applicants who are admitted to its ranks. The essence of this procedure

[1] See *Slaughterhouse Cases*, 83 U.S. 36 (1872); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

is that the Law School places somewhat less heavy reliance on certain tests when judging applications from minority students and somewhat greater reliance on factors of individual motivation and potential contribution to the law school and the profession. Petitioner reasons, however, that a program which admits more minority race students must necessarily limit the number of majority students admitted. Hence, he concludes that he is the subject of "suspect" classification because of his race.

This Court has only recently reminded us that under the Equal Protection Clause a "suspect" classification must bear the traditional indicia of suspectness, that it be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278, 1294 (1973). Thus in basing his attack on the University's affirmative action program largely on citation of language in cases condemning racial classifications which burden minority groups "(r)ather than focusing on the unique features of the alleged discrimination (the petitioner has) virtually assumed . . . findings of a suspect classification through a simplistic process of analysis . . ." *supra* at 1289.

Moreover as Mr. Justice Stewart has pointed out, suspect criteria are determined by their "purpose or effect" *supra* at 1311. Thus if petitioner's analysis were to be adopted by this court any program designed to eliminate the historic burden of discrimination against racial minorities would be subject to constitutional infirmity. Such a result would not only mark an end to our efforts toward racial equality but would frustrate the purpose of the Fourteenth Amendment in a way not heretofore sanctioned by decisions of this Court.

B. *The State's Interest in Training Minority Members of the Legal Profession Is the Kind of Interest Which American Education Has Always Sought To Advance.*

The State's desire to increase minority enrollment at the law school and in the legal profession proceeds from a philosophical perspective with which the petitioner clearly disagrees. Petitioner's Opening Brief, pp. 17-21. Thus petitioner would apparently prefer a system whereby law school admissions come as a reward to those applicants who score highly on certain tests. However, despite petitioner's disagreement with the State's purpose in adopting a flexible admissions policy, the state in doing so is well within the bounds of the traditional purposes of public education in this country.

Public education has always been grounded in the needs of the body politic and not in rewarding particular students for certain kinds of academic performance. Benjamin Rush, one of the signers of the Declaration of Independence, wrote that, "It is only by rendering knowledge universal, that a republican form of government can be preserved in our country."[2] This general proposition is amplified in the writings of others at the time. Realizing that the new government could not operate without social cohesiveness and understanding of the laws, Noah Webster wrote that: "Here every class of people should know and love the laws. This knowledge should be diffused by means of schools and newspapers; that an attachment to the laws may be formed by early impressions on the mind . . ."[3] And stressing the point that all classes of citizens needed this experience others wrote that: "Education should not

---

[2] Rush quoted in *Hansen, Liberalism and American Education* (New York, 1926) at p. 53.

[3] *Ibid.*, 73.

be left to the caprice, or negligence of parents, to chance, or confined to the children of wealthy parents."[4]

In this case the respondents have determined that the public purpose is served by increasing the number of lawyers in the minority community. To this end it has employed a flexible admissions policy in the hope of finding qualified minority students. Whatever else may be said of the state's determination in this regard it cannot seriously be argued that such a purpose is irrational or unreasonable in the light of the purposes which have always underlain American public education.[5]

II. This Court Ought Not Decide Important Constitutional Issues in a Case Which Lacks an Adequate Record and Is Very Likely Moot.

The parties to this case and supporting *amici* have asked this Court to decide the emotional and difficult issues involved in the currently raging public debate over "affirmative action" and "quotas." Inevitably the Court will have to reach the constitutional implications of this debate. However the record and posture in this particular case present prime examples of the principle that this Court should avoid premature adjudication of constitutional issues. *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972); *Rescue Army* v. *Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947). We urge this course even though "it would be convenient for the parties and the public to have promptly decided..." the issues in this

---

[4] *Ibid.*, 71.

[5] For judicial recognition of the underlying public purpose of education, see, e.g., *Ferrell* v. *Dallas Independent School District*, 261 F. Supp. 545 (N.D. Tex., 1966), *cert. denied* 393 U.S. 856 (1968): "One of the most important aims of the school should be to educate the individual to live successfully with other people in our democracy... (s)ociety expects public education to concern itself with building young citizens as well as teaching the '3R's'." at 552.

case. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345-6 (1936) (concurring opinion of Brandies, J.).

A. *The Record Is Inadequate in at Least Two Crucial Respects.*

First, petitioner has claimed that he was denied admission to the University of Washington Law School because "less qualified" minority students were admitted in his place. However the record shows that because of petitioner's ranking on the school's waiting list (St. 379) he would not have been admitted to the law school even if there had been no minority recruitment program (St. 453-455). Thus, even though some other majority student might be in a position to challenge the minority recruitment program petitioner who has failed to show that *he* is injured by the program may not do so. *Ashwander* v. *Tennessee Valley Authority, supra* at 347.

Second, important factual data relevant to the reasonableness of the state's actions in instituting the minority program is not developed in the record. And while we make no attempt here to fully develop that data some indication of what is missing is in order.

(1) In the case of *Gaston County, North Carolina* v. *United States*, 395 U.S. 285 (1969) this Court recognized that the imposition of a literacy test on Negro citizens who had been subject to past school segregation "would serve only to perpetuate these inequalities in a different form." at 297. Application of the *Gaston County* case to the instant litigation might well justify even more markedly different admissions criteria for black applicants if, for instance, many of Washington's black citizens had received education in states which had practiced school

segregation.[6] In fact such is very likely the case. According to 1970 Census figures some 42% of the black population of the State of Washington was born in the South.[7] Further reference to the public school records of Washington school children could have determined precisely in which school districts these Southern born black children had attended school before migrating to Washington. In any event the Southern black children who migrated to Washington clearly bore the scars of their past. According to one official report of the Washington State Census Bureau school teachers and principals in the City of Seattle uniformly referred to the adjustment problems of Negro school children who had migrated from the South. Schmid and Miller, *Population Trends and Educational Change in the State of Washington,* Washington State Census Board at 119 (1960). Thus it can be argued that a very large percentage of the potential black applicants to the University of Washington suffered the disabilities of past *de jure* segregation and that in adopting its affirmative action program the state was simply recognizing that the effects of "discrimination on account of color and racial origin is not confined to the South..." *Oregon* v. *Mitchell,* 400 U.S. 112, 134 (1970). See also the separate opinion of Mr. Justice Brennan, Mr. Justice White and Mr. Justice

[6] Testifying in favor of extension of the literacy test ban of the Voting Rights Act of 1965 to non-Southern states the Attorney General of the United States pointed to the effect of literacy tests on migrating Southern blacks. In reference to the *Gaston County* decision he said: "Thus, following the Supreme Court's reasoning, it would appear inequitable for a State to administer a literacy test to such a person because he would still be under the educational disadvantage offered in a State which had legal segregation." Hearings on Extension of the Voting Rights Act Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., ser. 3 (1969).

[7] U.S. Bureau of the Census, *State of Birth Subject Reports,* PC (2)-2(A), Table 27 and 28 (March, 1973). Of 69,975 black Washington residents in 1970, 29,388 were born in the South.

Marshall recognizing related implications of interstate migration, *supra* at 235-236.

(2) Not only does the record fail to show the origins of Washington's black population, it also lacks adequate reference to the fact of racial discrimination and isolation which greeted the newly arrived black migrants. A review of the cases shows that Washington's black population has been faced with widespread housing discrimination,[8] discrimination in public accommodations,[9] employment discrimination[10] and white resistance to school integration.[11] The resulting patterns of racial isolation and deprivation can also be shown through available statistics. A 1967 report of the United States Civil Rights Commission revealed that 60% of Negro elementary students in Seattle attended majority black schools even though Negro students accounted for only 10% of the elementary school population.[12] Other figures show that while only 2% of the white adult population of Washington had less than 5 years of elementary education, nearly 7% of the black and 16% of the Spanish speaking population had such little schooling.[13] It is not surprising then that mean family income for whites was more than $2,000 greater

---

[8] *O'Meara* v. *Washington State Board Against Discrimination*, 58 Wn.2d 793, 365 P.2d 1 (1961).

[9] *In re Johnson*, 71 Wash. 2d 245, 427 P.2d 968 (1967) (barber shops); *Price* v. *Evergreen Cemetery Company of Seattle*, 57 Wash. 2d 352, 357 P.2d 702 (1960); *Browning* v. *Slenderella Systems*, 54 Wash. 2d 440, 341 P.2d 859 (1959).

[10] *Arnett* v. *Seattle General Hospital*, 65 Wash. 2d 22, 395 P.2d 503 (1964); *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *cert. denied* 404 U.S. 984 (1971).

[11] *Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972); *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

[12] U.S. Commission on Civil Rights, 2 *Racial Isolation In The Public Schools*, App. A.1 (1967).

[13] U.S. Department of Commerce, *1970 Census of Population*, Volume 1, Part 49, Table 51 (1973).

than for blacks,[14] or that more than twice as many black families as white families had incomes under the poverty level.[15] And the latter disparity is even sharper for black youth under 25, some 25% of whom live at the poverty level compared with only 9% of their white counterparts.[16] Finally, and of special relevance to the facts in this case, there are but 15 black lawyers or judges in the State of Washington. White members of the legal profession and judiciary total nearly 4,000, more than five times greater than the white to black population ratio.[17]

(3) The foregoing statistical tale of inequality is indicative of the kind of information the record lacks, information making manifest the reasonableness of the affirmative action policy under attack in this case. Perhaps such evidence was not available at the time the case was tried. We do not know. We do know, however, that the respondents' repeated assertion that the University of Washington has never been guilty of racial discrimination in its history overlooks at least one widely reported recent incident. In 1971 the University's Human Rights body issued a report essentially corroborating charges by black students of a pattern of racially discriminatory conduct in the undergraduate athletic program.[18] This too was omitted from the record.

Thus with regard to the particular petitioner in this case the record is not sufficiently clear as to the precise harm he has suffered to allow for a decision on his constitutional claims. *Smith* v. *State of Mississippi*, 373 U.S. 238 (1963); *Commonwealth of Massachusetts* v. *Painten*, 389 U.S. 560 (1968). And as regards the broad constitutional questions presented by both sides, the record

---

[14] *Ibid.*, Table 57.
[15] *Ibid.*, Table 58.
[16] *Ibid.*, Table 207.
[17] *Ibid.*, Table 171.
[18] New York Times, January 23, 1971, p. 21.

does not adequately present the questions tendered. *Needleman* v. *United States*, 362 U.S. 600 (1960). Rather than "risk inconclusive and divisive disposition of a case when time may further illumine . . . the issues in dispute," *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77 (1955) this Court should refrain from a decision on the merits and dismiss the writ of certiorari as improvidently granted.

B. *This Case Is Moot. A Decision by This Court Will Have No Practical Effect on De Funis' Law School Career.*

In their Memorandum on the Question of Mootness the respondents make the following observation: "Counsel is further advised by the Dean of the law school . . . that if Mr. De Funis registers for the spring quarter . . . during the registration period from February 20, 1974 . . . that registration would not be canceled unilaterally by the university *regardless of the outcome of this litigation.*" (emphasis added). In other words a decision in this case announced after February 20, 1974 would have no effect whatsoever on petitioner's finishing his course of legal study. Petitioner has failed to show that he needs a constitutional decision from this Court to vindicate any currently claimed deprivation.[19]

A year ago when the state court reviewed the mootness issue it concluded that the case was not moot, largely because of the public interest in the ultimate issues involved in this litigation. That conclusion is, of course, not binding on this Court. *Liner* v. *Jafco, Inc.*, 375 U.S. 301,

[19] Petitioner has not alleged, for instance, that he will not be allowed to take bar examinations or be considered for membership in professional organizations.

304 (1964). In any event the intervening year has rendered even more unnecessary petitioner's desire for a constitutional decision. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

The respondents argue, however, that the case should be reached under the exception to the mootness doctrine for cases "capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U.S. 113 (1973). One need not exhaust the imagination to think of class action, declaratory judgment or other vehicles whereby these issues may reach this Court in a case which is not moot. In any event, far from being the kind of case which "evades review" the great public concern over the issues of affirmative action v. quotas makes highly likely this Court's review of the subject. And that being so, the Court ought not reach these issues in a case of first impression which lacks a petitioner with interests actually turning upon a decision by this Court.

Conclusion

One additional but perhaps fundamental reason counsels against this Court reaching the issues presented by the parties and *amici*. For if petitioner is successful the academic fate of minority law students will be placed in jeopardy not only at the University of Washington but also at law schools throughout the country. We intend no implication that the University is less than wholly committed to its current affirmative action program. Yet it is undeniable that present and future black and brown law students have the most to lose should this petitioner (who will gain nothing) prevail. That being the case it would seem of paramount importance that this Court have the benefit of an adequately developed record when it ultimately decides these questions. Thus we respectfully urge this Court to dismiss the case as moot or in the

alternative dismiss the writ as improvidently granted for the reason that the record does not adequately present the constitutional issues in the case.

Respectfully submitted,

J. Harold Flannery
Roger L. Rice
Center For Law and Education
Harvard University
14 Appian Way
Cambridge, Massachusetts